IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 681

JARBOE BROS. STORAGE WAREHOUSES, INC.,
Petitioner,

v.

ALLIED VAN LINES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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The Daily Record Co., Baltimore, Md. 21208

INDEX

Table of Contents

	PAGE
Statutes	1
Questions Presented	2
Statement of the Case	2-5
Argument:	
I. Allied properly canceled its contract with Jarboe	5-10
II. The case has no aspect of importance justifying the granting of the Writ of Certiorari	10-11
Conclusion	11

Table of Citations

Cases

Cottrell v. Pawcatuck Co., 116 A. 2d 787 (Del. Ch., 1955)	7
Glassberg v. Boyd, 116 A. 2d 711 (Del. Ch., 1955)	7
Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 279 (1949), reh. 339 U.S. 605, 612 (1950)	11
Levin v. Sinai Hospital, 186 Md. 174, 46 A. 2d 298 (1946)	7
Magnum Co. v. Coty, 262 U.S. 159, 163 (1923)	11
Murray-Baumgartner Surgical Instrument Co. v. Requardt, 180 Md. 245, 23 A. 2d 697 (1942)	7

Statutes

Title 8, Chapter 1, Delaware Code, 1953:	
Section 141(a)	1, 7
Section 142(c)	1, 7
Delaware L. 1967 C. 50	7

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STATUTES

Sections 141(a) and 142(c) of Title 8, Chapter 1, of the Delaware Code Annotated (1953) provide:

> Section 141(a): "The business of every corporation organized under this chapter shall be managed by a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation."
>
> Section 142(c): "The corporation may have such other officers, agents and factors as are necessary, who shall be chosen in such manner and hold their offices for such terms as are prescribed by the by-laws or determined by the board of directors or other governing body, and may secure the fidelity of any or all of such officers by bond or otherwise . . ."

QUESTIONS PRESENTED

1. Did Allied properly cancel its contract with Jarboe?

2. Has the case any aspect of importance justifying the granting of the Writ of Certiorari?

STATEMENT OF THE CASE*

On November 2, 1966, Lester J. Feit, the President and sole stockholder of the Petitioner, Jarboe Brothers Storage Warehouses, Inc. ("Jarboe"), an agent of the Respondent, Allied Van Lines, Inc. ("Allied"), was convicted in the United States District Court for the District of Maryland, of having submitted artificial, contrived and inflated bids by Jarboe for moving within the State of Maryland three companies, whose properties had been condemned for urban renewal purposes and who were being required to relocate. The bids were submitted on stationery of Jarboe which prominently displayed the Allied name and logotype. To create the illusion that the bids were competitive, Feit prepared and submitted higher bids on the stationery of Capitol Moving and Storage Company, Inc. ("Capitol"), another Allied agent, without the knowledge or consent of Capitol. Capitol's stationery also bore the Allied name and logotype, as well as the forged signatures of officials of Capitol.

At the time of Feit's conviction, Jarboe was an Allied agent pursuant to a No. 1 Non-Carrier Agency Contract

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* References herein to the Record are as follows:
1. The Joint Appendix in the United States Court of Appeals for the Fourth Circuit — "App. ....."
2. The Appellee's Appendix in the United States Court of Appeals for the Fourth Circuit — "Appellee App. ....."
3. Respondent's Exhibits in the United States District Court for the District of Maryland — "DX ....."
4. Petitioner's Exhibits in the United States District Court for the District of Maryland — "PX ....."
5. The Appendix in the Petition for Certiorari — "P. Apx. ....."

dated January 16, 1953, as amended August 8, 1963, reading in part as follows:

"1. Carrier for the term hereof covenants:

"1.1 To constitute and employ subject to its reasonable rules and regulations from time to time established the said Jarboe Bros. Storage Whses. as its Agent to solicit, to estimate the weight, size and charges of, to collect charges for and to book, register, pack, crate, prepare for transportation, receive, load, transfer, unload, store, warehouse and deliver for and in behalf of Carrier, shipments of commodities which the Carrier has authority to transport and as from time to time directed by Carrier to provide equipment and to bill and haul such or other shipments of such commodities;

* * * * * *

"2. Agent, for such term, accepts such agency employment at such compensation and covenants:

"2.1 To perform and discharge loyally, diligently and efficiently, all the duties and responsibilities of such agency and employment, under Carrier's complete and exclusive control, direction and supervision and in strict compliance with Carrier's then reasonable rules and regulations, as well as with all laws, orders and regulations of competent governmental authority;

* * * * * *

"3. The Parties mutually covenant:

"3.1 The term hereof shall be for a period of one (1) year from date and thereafter until terminated as follows: Agent may terminate this contract with or without cause upon ninety (90) days written notice to Carrier; Carrier may terminate this contract upon ten (10) days notice to Agent if and only if

Agent for a period of ninety (90) days after notice by the Carrier so to do shall fail or refuse to cure or remedy any breach by him of this agreement claimed by the Carrier in such notice, unless within such period the Agent shall either

(1) demand arbitration as provided in section 3.2 hereof, in which case the contract may be terminated by the Carrier if Agent shall fail fully to comply with the award of such arbitration within thirty (30) days after notice so to do; or

(2) file an action or suit in a court of competent jurisdiction to enjoin such termination in which case the contract may be terminated by the Carrier if and only if there shall be no final decree or judgment of such court enjoining such termination."

At a meeting of the Allied Board of Directors, which took place on November 16-18, 1966, the Board was notified by Allied's General Counsel and Assistant Secretary, J. Dayton Ford, of the plea of guilty and conviction of Feit on the charges contained in the Indictment (App. 119). The Board had before it a copy of the Indictment, a number of newspaper articles concerning the conviction and copies of the bids involved in the Indictment bearing the Allied name and logotype (App. 120; DX 2, 3, 4, 5, App. 374-380; DX 18, 19b2, App. 399-404, 409-411).

The Board thereupon directed its officers to send notice to Jarboe of the cancellation of its Non-Carrier Agency Contract pursuant to Section 3.1 of that Contract (PX 6, App. 259-260).

By letter dated December 2, 1966, J. Dayton Ford notified Jarboe of the action of the Allied Board on November 16-18, 1966, and that "the plea and adjudication of guilt of Lester J. Feit to the three counts of the indictment in Criminal Action No. 27296 in the U. S. District Court for the District of Maryland places you in breach of your agency contract." Jarboe was also told in that letter that it had 90 days from the receipt thereof to remedy its breach.

On April 27, 1967, Jarboe instituted suit in the Circuit Court of Baltimore City to enjoin cancellation of its No. 1 Non-Carrier Agency Contract dated January 16, 1953, as amended August 8, 1963 (PX 3, 6, 8, Appellee App. 1-9). Allied removed the suit to the United States District Court for the District of Maryland, where it was tried on August 21-24, 28-29, 1967, before the Honorable Frank A. Kaufman. At the close of Jarboe's case, upon motion of Allied, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, Judge Kaufman dismissed the case.

In dismissing the case, Judge Kaufman held that Petitioner had breached its contract with Respondent, that Petitioner, though having had the opportunity to do so, had failed to cure its breach and that Respondent had canceled the contract properly. The United States Court of Appeals for the Fourth Circuit on September 5, 1968, affirmed these findings, stating in part:

> "The contract entitled Jarboe to notice and a hearing before its agency was terminated. These requirements were satisfied. Allied gave specific notice of the reason for the cancellation in the letter written by its general counsel. By contract the parties had dispensed with an intra-corporate hearing, and substituted proceedings before an arbitrator or a court at the option of the agent. Jarboe elected to have its hearing before a court" (P. Apx. 7a).

ARGUMENT

I.

ALLIED PROPERLY CANCELED ITS CONTRACT WITH JARBOE

At its meeting on November 16-18, 1966, the Allied Board of Directors directed its officers to issue notice of cancellation to Jarboe of its Non-Carrier Agency Contract pursuant to Section 3.1 of that Contract. By letter dated December 2, 1966, J. Dayton Ford, Allied's General Counsel and As-

sistant Secretary, so notified Jarboe, as well as Jarboe's counsel, Richard Moxley. Allied's notice to Jarboe identifies the breach which was the cause for its issuance as "the plea and adjudication of guilt of Lester J. Feit to the three counts of the Indictment in Criminal Action No. 27296 in the United States District Court for the District of Maryland. . . ."

At this point, under Section 3.1 of the Agency Contract, Jarboe could have challenged Allied's claim of breach by demanding arbitration or by filing an action or suit in a court of competent jurisdiction to enjoin such termination. Instead of following either of these paths, Jarboe admitted "actual breach" and stated that it would "cure and remedy the actual breach of contract by performing and discharging loyally, diligently and efficiently, all the duties and responsibilities of our agency as provided in the agency contract" (DX 6, App. 381-382).

Despite Allied's indication to Jarboe contained in a letter dated January 9, 1967, that Jarboe's business-as-usual approach would not result in a cure, and Allied's General Counsel's suggestion that cure could possibly be brought about by Lester J. Feit's complete divestiture of all interest in and relationship to Jarboe and a change in agency name, Jarboe persisted in its position that it need do nothing more to effect a cure than promise to offend no more. By letter dated April 17, 1967, Allied gave Jarboe the requisite 10 day notice of cancellation (PX 8, App. 260-261).

That the Allied Board of Directors was the proper body to effect the cancellation of the Agency Contract is manifest from the general corporation law of Delaware, as well as from the Certificate of Incorporation, Bylaws and Rules and Regulations of Allied.

Allied was incorporated under the general corporation law of Delaware, Title 8, Chapter 1, Delaware Code, 1953, Section 141(a) of that general corporation law provided that: "The business of every corporation organized under the provisions of this chapter shall be managed by a board of directors . . .", and Section 142(c) thereof further provided:

> "The corporation may have such other officers, agents and factors as are necessary, who shall be chosen in such manner and hold their offices for such terms as are prescribed by the by-laws or determined by the board of directors or other governing body, and may secure the fidelity of any or all of such officers by bond or otherwise . . ."[1]

Article Ninth A of Allied's Certificate of Incorporation concerned with the powers of the Allied Board of Directors specifically provides that it is "in furtherance, and not in limitation of the powers conferred by statute" on the Board of Directors (PX 1, App. 238).

Allied's Board of Directors never relinquished its statutorily given powers "to deal with particular agents and cir-

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[1] Decisions of the courts of both Delaware and Maryland make it clear that the affairs of a corporation are managed and conducted by its board of directors. See e.g., *Glassberg v. Boyd,* 116 A. 2d 711 (Del. Ch. 1955); *Cottrell v. Pawcatuck Co.,* 116 A. 2d 787 (Del. Ch., 1955); *Levin v. Sinai Hospital,* 186 Md. 174, 46 A. 2d 298 (1946); *Murray-Baumgartner Surgical Instrument Co. v. Requardt,* 180 Md. 245, 23 A. 2d 697 (1942).

The general corporation law of Delaware was revised by L. 1967 C. 50, but the language of Section 141(a) was not affected, and Section 142(c), with the language concerning factors eliminated, was divided into two subsections (b) and (c) which read: "(b) The corporation may have such other officers and agents as are desired, who shall be chosen in such manner and hold their offices for such terms as are prescribed by the by-laws or determined by the board of directors or other governing body. (c) The corporation may secure the fidelity of any or all of its officers or agents by bond or otherwise."

cumstances so as to protect and enhance the best interests of the Corporation" and when it passed Rule 27 of the Rules and Regulations of Allied, it particularly stated that the procedures set forth in that Rule for dealing with complaints against agents were "supplemental to and not in limitation of" the aforesaid "general powers of the Board of Directors." Jarboe recognized and stipulated in this proceeding that Rule 27 "is specifically supplemental to the general powers of the Board of Directors to otherwise deal with agents so as to protect the interests of the corporation" (PX 5, App. 256-257).

Nothing in the contract between the parties, the laws of Delaware, in Allied's Certificate of Incorporation, its Bylaws or its Rules and Regulations requires that Allied must give an agent a hearing before cancelling its contract. The contract does provide, however, that, if the agent is dissatisfied with Allied's decision to cancel, it can submit the matter to arbitration or can file suit to enjoin cancellation in a court of competent jurisdiction.

In the instant case, Jarboe not only had the benefit of judicial hearings and determinations on the propriety of Allied's action, but it initially had a hearing before another United States District Judge and a federal petit jury on the facts resulting in the conviction, which was the basis for cancellation of the contract. Jarboe has never denied that Lester J. Feit, Jarboe's President and sole stockholder, while acting for Jarboe, committed the crimes for which he was convicted. In fact, Jarboe, at the trial herein, produced as its own exhibit the transcript of the guilty pleas entered by Lester J. Feit to the charges contained in the indictment filed against him.

It is, consequently, difficult to perceive what purpose would have been served had a hearing been held within

the Allied corporate structure, there being no dispute about the facts. Be that as it may, there is no right in Jarboe, either pursuant to its contractual relations with Allied, or on constitutional grounds of due process, to demand an intra-corporate hearing.

Whenever one party to a contract determines that, in its judgment, the other has committed a breach, the first party has the right to terminate without affording the other a hearing, subject only to the condition that the terminating party must be prepared to sustain the correctness of its position in any court proceeding instituted by the other. The agency contract in the instant case is in no way different in this respect from a contract for sale of goods terminated by a buyer for alleged breach of warranty of fitness. No one would suggest that, before cancelling, the buyer would have to give the seller a hearing on whether there was, in fact, a breach.

It may, indeed, be argued with force that Jarboe was provided with an intra-corporate hearing, inasmuch as it was permitted to appear through its President, Secretary and counsel at a February, 1967, meeting of the Allied Board to show "why the proposed action of the Board of Directors should not be taken". But, whether there was a hearing or not, the factor of controlling importance here was the contractually afforded right to contest Allied's termination of the contract in a court of competent jurisdiction. Jarboe has availed itself of that right and has had its day in court. This assured due process to Jarboe, and no intra-corporate hearing was essential to achieve that end.

The No. 1 Non-Carrier Agency Contract between Allied and Jarboe makes no mention of shipments in intrastate commerce or interstate commerce. Pursuant to Section 2.1 of that Contract, the Agent covenants:

> "To perform and discharge loyally, diligently and efficiently, all the duties and responsibilities of such agency and employment, under Carrier's complete and exclusive control, direction and supervision and in strict compliance with Carrier's then reasonable rules and regulations, as well as with all laws, orders and regulations of competent governmental authority;"

Uncontradicted testimony at trial established that Allied did not have in 1953, nor has it now, an agency contract which concerns solely interstate or solely intrastate commerce but that, on the contrary, the one contract governs all carriage, interstate and intrastate alike (App. 47-51, 67).

The interstate-intrastate distinction was a complete afterthought contrived in desperation out of whole cloth and is repeated in the Statement of the Case section of the Petition, though it was not nor can it be supported.

II.

THE CASE HAS NO ASPECT OF IMPORTANCE JUSTIFYING THE GRANTING OF THE WRIT OF CERTIORARI.

Involved is a single question concerning the propriety, under a particular set of facts, of the manner of cancellation of a contract between two private parties. No real issue of importance under the Constitution, laws or treaties of the United States is posed, nor is any conflict between lower federal courts or this Court's supervisory power over lower federal courts involved. Both the United States Court of Appeals for the Fourth Circuit and the United States District Court for the District of Maryland held that the Respondent acted properly in canceling the contract, and the Petition is devoid of a reference to any evidence or citation of authority which would even tend toward contrary findings, or demonstrate error on the part of the Courts below.

Petitioner, not being satisfied with the concurrent findings of the District Court and the Fourth Circuit Court of Appeals, now petitions for review by this Court. Such a request is inappropriate. *Magnum Co. v. Coty*, 262 U.S. 159, 163 (1923); *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 279 (1949), reh. 339 U.S. 605, 612 (1950).

CONCLUSION

Petitioner champions no cause worthy of consideration. Petitioner breached its agency contract through action involving patent disloyalty to its principal and was properly discharged. The propriety of the discharge has been fully litigated and established in proceedings in which Petitioner had its day in court.

The Petition should be dismissed.

Respectfully submitted,

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